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Nos. 06-82, 06-84, 06-100, & 06-101

In the Supreme Court of the United States

HARTFORD FIRE INSURANCE COMPANY, PETITIONER
v.
JASON RAY REYNOLDS, RESPONDENT

SAFECO INSURANCE COMPANY OF AMERICA, *ET AL.*, PETITIONERS
v.
CHARLES BURR, *ET AL.*, RESPONDENTS

GEICO GENERAL INSURANCE COMPANY, *ET AL.*, PETITIONERS
v.
AJENE EDO, RESPONDENT

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *ET AL.*, PETITIONERS
v.
JULIE WILLES, RESPONDENT

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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BRIEF FOR FREEDOMWORKS FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Fair Credit Reporting Act requires an insurance company to notify a consumer of an "adverse action" whenever it offers a policy at a rate greater than the rate the company might have offered if the consumer had perfect credit.

2. Whether an insurance company may be liable for punitive damages for "willful" violation of the Fair Credit Reporting Act based solely upon a finding that it acted with "reckless disregard" of the statutory notice requirement.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

INTRODUCTION AND INTEREST OF *AMICUS CURIAE* 1

STATEMENT 3

SUMMARY OF ARGUMENT 5

ARGUMENT 7

I. The Ninth Circuit's Expansive Reading Of FCRA's Notice Requirement Is Far Broader Than Congress Intended, To The Ultimate Detriment Of Consumers. 7

A. The Ninth Circuit's Interpretation Of FCRA's "Adverse Action" Provision Is Inconsistent With The Statutory Text. 8

B. The Ninth Circuit's Interpretation Of FCRA's "Adverse Action" Provision Undermines The Policy Objectives Of The Statute 9

II. Contrary To The Decisions Of Most Other Circuits, The Decision Below Subjects Covered Businesses To Punitive Damages For Unwitting Violation Of FCRA's Requirements, Thereby Increasing The Cost Of Credit To All Consumers 13

III. The Decisions Below Are Of Enormous Practical Importance Not Only To The Financial Services Industry, But To Consumers Of Their Services 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

CASES:

Bryan v. *United States*, 524 U.S. 184 (1998) 14

Cushman v. *Trans Union Corp.*, 115 F.3d 220 (3d Cir. 1997) 15

Dalton v. *Capital Associated Industries, Inc.*, 257 F.3d 409 (4th Cir. 2001) 15

Duncan v. *Handmaker*, 149 F.3d 424 (6th Cir. 1998) 15

In re Bridgestone/Firestone, Inc., 288 F.3d 1012 (7th Cir. 2002) 17

Phillips v. *Grendahl*, 312 F.3d 357 (8th Cir. 2002) 15

Ratzlaf v. *United States*, 510 U.S. 135 (1994) 15

Reynolds v. *Hartford Financial Services Group, Inc.*, 435 F.3d 1081 (9th Cir. 2006) ..... *passim*

Spies v. *United States*, 317 U.S. 492 (1943) 14

Stevenson v. *TRW, Inc.*, 987 F.2d 288 (5th Cir. 1993) 15

TRW Inc. v. *Andrews*, 534 U.S. 19 (2001) 7

Trans Union LLC v. *FTC*, 536 U.S. 915 (2002) 3

Upjohn Co. v. *United States*, 449 U.S. 383 (1981) 17

Wantz v. *Experian Information Solutions*, 386 F.3d 829 (7th Cir. 2004) 15

STATUTES:

15 U.S.C. § 1681 ..... 7, 9, 10

15 U.S.C. § 1681a 3, 7, 8

15 U.S.C. § 1681b 7, 8

15 U.S.C. § 1681g 7

15 U.S.C. § 1681m 3, 7, 8

15 U.S.C. § 1681n 4, 13, 14

15 U.S.C. § 1681q 15

MISCELLANEOUS:

Robert B. Avery, *et al., An Overview of Consumer Data and Credit Reporting*, Federal Reserve Bulletin 47 (Feb. 2003) 9, 19

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The Fair Credit Reporting Act and Issues Presented by Reauthorization of the Expiring Preemption Provisions: Hearings Before the S. Comm. on Banking, Housing, & Urban Affairs, 108th Cong. (2003) 12

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Henry J. Friendly, *Federal Jurisdiction: A General View* (1973) 17

H.R. 19403, 91st Cong. § 52 (1970) 14

H.R. 19410, 91st Cong. § 52 (1970) 14

Insurance Information Institute, *Direct Premiums Written, Property/Casualty Insurance By State, 2005*, available at http://www.economic-insurancefacts.org/economics/state/premiums.htm 20

David L. Permut & Tamra T. Moore, *Recent Developments in Class Actions: The Fair Credit Reporting Act*, 61 Bus. Law. 931 (2006) 3, 19

Restatement (Second) of Torts § 282 (1965) 14

S. 3678, 91st Cong. § 616 (1970) 14

S. 3678, 91st Cong. § 617 (1970) 14

S. Rep. No. 108-166 (2003) 11

United States Department of Commerce, Bureau of Economic Analysis, *Gross State Product*, available at http://www.bea.gov/bea/regional/gsp.htm 19

INTRODUCTION AND INTEREST OF *AMICUS CURIAE*

In the decisions below, the Ninth Circuit has interpreted the Fair Credit Reporting Act (FCRA) in a way that not only conflicts with decisions in other circuits, but also, because of the Ninth Circuit's importance in our national economy, threatens to undo many of the benefits that FCRA has heretofore provided to both consumers and businesses nationwide. The Ninth Circuit's expansive interpretation of FCRA's notice requirement threatens to increase the costs of compliance for users of credit information while decreasing the likelihood that consumers will actually benefit from "adverse action" notices. Moreover, in its equally expansive interpretation of the "willfulness" standard for punitive damages, the Ninth Circuit has departed from the near-uniform position of other federal courts of appeals, opening the door to punitive awards even where users of credit information relied in good faith on the advice of counsel in determining their obligations under the statute. These results are not consistent with the text or structure of FCRA, and they threaten to disrupt the efficiency of the consumer credit market and increase the costs of credit nationwide—to the ultimate detriment of consumers. This Court's intervention is urgently needed to avoid that unfortunate result.

FreedomWorks Foundation, like its affiliate FreedomWorks (formerly known as Citizens for a Sound Economy), has a strong interest in these cases. It is a nonprofit, nonpartisan organization dedicated to promoting free-market solutions to economic problems at the state and national levels. Indeed, for more than two decades, FreedomWorks and its predecessors and affiliates have been a leading voice on a range of economic policy

issues, from taxation and regulation to entitlement reform, competitiveness, and consumer protection.[1]

FreedomWorks is especially interested in the proper interpretation and application of the Fair Credit Reporting Act (FCRA). In 2003, FreedomWorks' chief economist testified before a congressional subcommittee on the effectiveness of FCRA and the importance of uniform national standards for sharing financial information. See *Fair Credit Reporting Act: How It Functions for Consumers and the Economy: Hearing Before the Subcomm. on Financial Institutions and Consumer Credit of the H. Comm. on Financial Services*, 108th Cong. 66-68, 229-233 (2003) (statement and testimony of Wayne T. Brough). As he explained there, FreedomWorks believes FCRA has been instrumental in creating an efficient and highly integrated framework for sharing consumer credit information, a framework that has produced greater opportunities for consumers to obtain such credit. FCRA's success results from a well-considered policy not to restrict the free flow of information, but to provide reasonable standards that protect consumer privacy.

FreedomWorks believes this Court should grant review and reverse the decisions below to give FCRA the uniform nationwide interpretation that its plain terms require, and to ensure that the statute continues to foster the efficient consumer credit market that Congress contemplated.

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[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. In accordance with Rule 37.6, *amicus* states that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *amicus*, has made a monetary contribution to the preparation or submission of this brief.

STATEMENT

"In recent years, there has been a proliferation of class action lawsuits brought under the [FCRA]," in part because of "the availability of fee shifting and statutory damages, and the lack of a class action damages cap." David L. Permut & Tamra T. Moore, *Recent Developments in Class Actions: The Fair Credit Reporting Act*, 61 Bus. Law. 931, 931 (2006). In nationwide class actions, these statutory damages—$100 to $1000 per violation—threaten insurance companies and other covered entities with "crushing liability" that could have "adverse effects on both the national economy and * * * employees." *Trans Union LLC* v. *FTC*, 536 U.S. 915, 917 (2002) (Kennedy, J., dissenting from denial of certiorari).

The cases now before the Court are nationwide class actions filed in the District of Oregon. The named plaintiffs allege that their insurers (and all those companies' affiliates) willfully violated FCRA by failing to provide notice of "adverse actions" that resulted from evaluation of applicants' credit information. The named plaintiffs seek statutory damages of $100 to $1000 for each class member, as well as punitive damages and attorney's fees. The district court granted summary judgment in favor of the insurance companies, but the Ninth Circuit reversed.

The Ninth Circuit held that the defendants in these nationwide class actions were not entitled to judgment as a matter of law and that the named plaintiffs' claims should be decided by juries. *First*, the court adopted an expansive definition of "adverse action" for purposes of FCRA's notice requirement. FCRA provides that any person who "takes any adverse action with respect to any customer that is based in whole or in part on any information contained in a consumer report" must give "notice of the adverse action to the consumer." 15 U.S.C. § 1681m(a). With respect to insurance, the statute defines an "adverse action" as "a denial or cancellation of, an

increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for." *Id.* § 1681a(k)(1)(B)(i).

According to the Ninth Circuit, "an increased charge is a charge that is higher than it would otherwise have been but for the existence of some factor that causes the insurer to charge a higher price." *Reynolds* v. *Hartford Fin. Servs. Group, Inc.*, 435 F.3d 1081, 1091 (9th Cir. 2006). Thus, "whenever because of his credit information a company charges a consumer a higher initial rate than it would otherwise have charged, it has increased the charge within the meaning of FCRA" and must provide an adverse-action notice. *Id.* at 1092. According to the Ninth Circuit, FCRA "requires such notices whenever a consumer pays a higher rate because his credit rating is less than the top *potential* score." *Id.* at 1093 (emphasis added).

Second, the court held that the insurance companies could be liable for "willful" violations of the notice requirement even if they sought, and relied on, the advice of counsel in determining that notice was not necessary. The statute provides that "[a]ny person who willfully fails to comply with any requirement under [FCRA] with respect to any consumer is liable to that consumer" for actual (or statutory) damages, punitive damages, and attorney's fees. 15 U.S.C. § 1681n.

Following the Third Circuit—but contrary to decisions of the Sixth, Seventh, and Eighth Circuits—the Ninth Circuit held that the term "willfully" in FCRA "entails a conscious disregard of the law, which means either knowing that policy [or action] to be in contravention of the rights possessed by consumers pursuant to the FCRA or in *reckless disregard* of whether the policy [or action] contravened those rights." *Reynolds*, 435 F.3d at 1098 (emphasis added) (quotations omitted).

In adopting this reckless-disregard standard for willfulness, the court expressed concern about "perverse

incentives for companies covered by FCRA to avoid learning the law's dictates by employing counsel with the deliberate purpose of obtaining opinions that provide creative but unlikely answers to 'issues of first impression.'" *Id.* at 1099. "Because a reckless failure to comply with FCRA's requirements can result in punitive damages," the court reasoned, "insurance and other companies will more likely seek objective answers from their counsel as to the true meaning of the statute." *Ibid.* Under the Ninth Circuit's rule, a company's liability for punitive damages now depends upon whether its counsel's advice is "tenable, albeit erroneous" or "implausible" and "indefensible." *Ibid.*

SUMMARY OF ARGUMENT

The decisions below warrant review because they misinterpret FCRA in ways that will both impede the effectiveness of information-sharing in the consumer credit market and increase the cost of doing business. By requiring insurers to give notice to consumers whenever they charge a rate, based on the consumer's credit information, that is higher than the rate they would otherwise charge, the decisions below significantly increase the cost of FCRA compliance and effectively require that notice be given to every insurance applicant whose credit rating is less than perfect. Moreover, reading the statute to require notice to consumers in such a broad range of circumstances threatens to dilute the effect of credit-related notices that consumers *do* need to receive—by converting "adverse action" notices into white noise that consumers will come to ignore.

What is more, by lowering the bar of liability for "willful" violations, the decisions below impose significant burdens on insurance companies (and others) that merely use credit information for legitimate risk assessment purposes.

All of these results upset Congress's calibration of regulatory requirements and portend higher costs for

consumers seeking credit without providing them with corresponding benefits. And the effect will be felt by millions of consumers, because the notice requirement applies to all users of credit reports, the "adverse action" definition applies to all insurance companies that rely on credit reports, and the "willful" violation provision applies even more broadly—to every business that is covered by FCRA. Indeed, since these cases are nationwide class actions, the decisions below not only pose a danger of devastating liability for the insurance companies involved, but they may also effectively set nationwide standards of both liability and care.

Equally important, the decisions below represent a departure from the standards applied in most other courts of appeals throughout the country. Division among the courts of appeals on an issue affecting so many businesses itself warrants a grant of certiorari. Disparity undermines the chief virtue of FCRA—uniform standards governing national markets.

But the Ninth Circuit's decisions pose an additional threat. Given the circuit's expansive territory and the scope of the markets its rulings govern—comprising nearly 20 percent of the Nation's gross domestic product in 2004—the decisions below will also create extraordinary pressure for firms operating nationwide to conform their conduct in *all* jurisdictions to the court's broad reading of FCRA's notice requirements, simply to avoid having to enforce divergent notice policies in different offices. Thus, absent this Court's intervention, the Ninth Circuit's decision may, as a practical matter, be the last word on the standard that many companies apply in seeking to comply with FCRA. But that makes no sense: the authoritative interpretation of FCRA should come from this Court, not a single court of appeals that happens to have a large geographic jurisdiction.

ARGUMENT

The decisions below reflect fundamental misreadings of two key provisions of FCRA that affect millions of credit transactions nationwide. By construing the notice requirement to apply whenever a consumer obtains credit on terms less advantageous than might be available to a hypothetical "perfect" consumer, the decisions below impose significant burdens on users of credit reports while diminishing the utility of adverse-action notices to consumers. And by construing the term "willful" to include mere recklessness, the decisions below ensure that users of credit reports will face heightened risks of punitive damages liability that can be mitigated only by second-guessing the advice of counsel and interpreting FCRA in the most restrictive manner possible. The decisions below thus place on FCRA a judicial gloss that imposes significant additional compliance costs on businesses, but without corresponding benefits to consumers.

I. The Ninth Circuit's Expansive Reading Of FCRA's Notice Requirement Is Far Broader Than Congress Intended, To The Ultimate Detriment Of Consumers.

As this Court has noted, "Congress enacted the FCRA in 1970 to promote efficiency in the Nation's banking system and to protect consumer privacy." *TRW Inc.* v. *Andrews*, 534 U.S. 19, 23 (2001) (citing 15 U.S.C. § 1681(a)). To accomplish these objectives, the statute regulates "consumer reporting agencies" that generate "credit reports" for use in determining consumers' eligibility for credit, insurance, and employment. See 15 U.S.C. §§ 1681a, 1681b. Under the statute, reporting agencies are required to take steps to assure accuracy in credit information, to limit the disclosure of credit information to appropriate parties, and to give consumers access to their credit information so they can correct any mistakes. See *id.* §§ 1681(b), 1681b, 1681g.

In addition, FCRA regulates *users* of credit reports such as the insurance companies here. See *id.* § 1681m. Insurance companies, like other credit providers, use credit reports in assessing risks. Under FCRA, users of credit reports must give consumers notice of so-called "adverse actions" taken based on their credit information. *Id.* § 1681m(a)(1). As shown below, the Ninth Circuit has misinterpreted these provisions, and has done so in a way that threatens to destroy many of FCRA's benefits to consumers and businesses alike.

A. The Ninth Circuit's Interpretation Of FCRA's "Adverse Action" Provision Is Inconsistent With The Statutory Text.

FCRA defines "adverse action" in various commercial contexts, including the extension of credit, provision of insurance, employment decisions, and government licensing. See *id.* § 1681a(k)(1). In the insurance context, an "adverse action" is "a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for." *Id.* § 1681a(k)(1)(B).

Nothing in the statute, however, compels the Ninth Circuit's conclusion that an adverse-action notice is required "whenever a consumer pays a higher rate because his credit rating is *less than the top potential score*." *Reynolds*, 435 F.3d at 1093 (emphasis added). Indeed, the statute makes no reference to the hypothetical perfect credit rating. Rather, it focuses on a *change* in the price or terms of insurance offered to a specific consumer with specific actuarial characteristics as well as a specific credit rating. If a consumer receives an offer of insurance at a certain price and on certain terms based on non-credit-related characteristics, he is adversely affected by his credit rating only if the insurer, after considering the credit rating, *changes* the offer by raising the price or reducing the coverage or otherwise making the terms less

favorable. The relevant comparison is between (1) the consumer described by all his characteristics except his credit rating and (2) the same consumer described by all his characteristics including his credit rating. It is not between the real-life consumer and the Platonic Form of creditworthiness.

B. The Ninth Circuit's Interpretation Of FCRA's "Adverse Action" Provision Undermines The Policy Objectives Of The Statute.

Not only does the Ninth Circuit's rule exceed the plain meaning of the statute and defy common sense, but it also upsets the delicate balance of interests that Congress struck when it enacted the statute. Congress enacted FCRA recognizing that "[t]he banking system is dependent upon fair and accurate credit reporting. Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system." 15 U.S.C. § 1681(a)(1).

1. Reliable credit information is essential to risk assessment and pricing decisions in the consumer credit market. As FreedomWorks' chief economist has explained, there is "a strong statistically significant correlation" between "credit scores [and] loss." *Fair Credit Reporting Act: How It Functions for Consumers and the Economy*, *supra*, at 232 (testimony of Wayne T. Brough). "Overall, research and creditor experience has consistently indicated that credit reporting company information, despite any limitations that it may have, generally provides an effective measure of the relative credit risk posed by prospective borrowers." Robert B. Avery, *et al.*, *An Overview of Consumer Data and Credit Reporting*, Federal Reserve Bulletin 47, 51 (Feb. 2003).

Thus, it should come as little surprise that insurance companies use credit information for legitimate risk-assessment purposes:

> [I]nsurance companies have used the information in credit scores as a risk characteristic to help predict future losses. This allows companies to price products more efficiently, while covering their costs. Risk classification allows insurers to divide individuals into groups with similar claims and set prices based on the probability of future loss. Driving history, age and gender are common variables to classify risk, but increasingly insurance scores with credit have been found to be more reliable predictors of future risk.

Fair Credit Reporting Act: How It Functions for Consumers and the Economy, supra, at 67 (statement of Wayne T. Brough).

Insurers' use of credit information helps consumers in two distinct ways. First, it enables insurers to set prices for insurance based on likely risk, which keeps them from setting prices unnecessarily high. "Restricting credit history information as an underwriting tool," by contrast, "would result in higher costs for insurers and higher premiums for policyholders." *Id.* at 233 (testimony of Wayne T. Brough).

Second, use of consumer credit histories improves the fairness of risk classification and thereby increases the availability of insurance to classes of consumers who otherwise might go without coverage. "[W]hen consumer credit histories are used as an underwriting criterion, they tend to increase the fairness and accuracy of risk classification. * * * With the ability to classify risk more accurately, insurers gain the ability to provide a wider array of products that can be offered to customers they otherwise could not serve." *Id.* at 232 (testimony of Wayne T. Brough).

2. This is in keeping with Congress' own goals in passing FCRA. Even as Congress recognized that "[c]onsumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers," it sought to respond to the

"need to [e]nsure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." 15 U.S.C. § 1681(a)(3)-(4). Thus, FCRA reflects Congress' judgment on the appropriate balance of efficiency in the credit market and reasonable consumer protection: it "strikes a balance between the privacy interests of consumers with respect to the contents of their credit reports and the need of businesses to access the information required to make accurate real time assessments of consumer qualifications." S. Rep. No. 108-166, at 5 (2003).

FCRA promotes efficiency in the consumer credit market by maintaining credit providers' ability to make decisions based on consumers' actual experiences. At the same time, however, FCRA protects consumers by ensuring that they are made aware of the impact of their credit reports in the marketplace. Indeed, FCRA's notice requirement facilitates the free flow of information by requiring users of credit information to alert consumers when they are "taxed"—by higher rates or less favorable terms—because of their credit ratings. These adverse-action notices benefit consumers by (1) showing them how their credit standing affects their position in the marketplace, and (2) enabling them quickly to identify and correct errors in their credit reports.

The balance that Congress struck in FCRA between allowing businesses to use credit histories while providing consumers with notice of genuinely adverse credit-related actions has been vindicated by the performance of the nation's consumer credit market. Credit is available to more consumers today than ever before, undoubtedly (at least in part) because FCRA created a uniform national system of credit reporting that promotes efficiency in information-sharing, accuracy in risk assessment, and privacy for consumers. As one Federal Reserve Board official told Congress: "The ready availability of accurate, up-to-date credit information from consumer reporting

agencies benefits both creditors and consumers. Information from consumer reports gives creditors the ability to make credit decisions quickly and in a fair, safe and sound, and cost-effective manner. Consumers benefit from access to credit from different sources, vigorous competition among creditors, quick decisions on credit applications, and reasonable costs for credit. *Fair Credit Reporting Act: How It Functions for Consumers and the Economy*, *supra*, at 431 (testimony of Dolores Smith).

3. By requiring insurers to notify consumers of an "adverse action" every time insurers use consumer credit histories as a basis for charging a rate higher than the lowest hypothetical rate, the Ninth Circuit's reading of FCRA increases the cost of using such credit information and threatens harm to consumers both in the form of increased prices and decreased availability for those who are at risk of not getting coverage. This Court's review is warranted to prevent that result.

Moreover, gratuitous adverse-action notices actually *undermine* the important functions that Congress intended such notices to perform. The more notices a consumer receives, the less importance he will attach to any particular notice and the less attention he will pay to all such notices. As the director of the Federal Trade Commission's Bureau of Consumer Protection has explained, "if you give notices too widely and in too many circumstances, then it * * * becomes something that people ignore. The adverse action notice, as it was originally envisioned, fit well in the set of circumstances where consumers needed to pay attention to the credit report and did not raise a lot of false alarms." *The Fair Credit Reporting Act and Issues Presented by Reauthorization of the Expiring Preemption Provisions: Hearings Before the S. Comm. on Banking, Housing, & Urban Affairs*, 108th Cong. 95-96 (2003) (testimony of J. Howard Beales, III).

By requiring that notice be given "whenever a consumer pays a higher rate because his credit rating is less than the top potential score," *Reynolds*, 435 F.3d at 1093, the Ninth Circuit has ensured that there will be "a lot of false alarms" that will only devalue appropriate adverse-action notices. And by requiring that such notices identify *every affiliated entity* that participates in setting premium rates, see *id.* at 1096, the Ninth Circuit has ensured that consumers will be flooded with gratuitous information concerning a single transaction. Under the court of appeals' view, credit notices that consumers would ordinarily want to know about will be drowned out by the white noise of numerous meaningless reports that the court's expansive interpretation of "adverse action" requires.

In sum, the decisions below substitute the Ninth Circuit's theory of regulation for Congress' judgment on national economic policy. Requiring notice virtually every time an insurance company provides an initial policy—even when the consumer's credit information had no impact or a favorable impact on his ability to obtain credit—amounts to over-regulation that imposes additional costs on insurance companies without delivering additional benefits to consumers. This Court should grant the petitions to give a uniform interpretation to FCRA's notice requirement, one that is consistent with Congress' policy objectives and protective of consumers' interests in obtaining credit.

II. Contrary To The Decisions Of Most Other Circuits, The Decision Below Subjects Covered Businesses To Punitive Damages For Unwitting Violation Of FCRA's Requirements, Thereby Increasing The Cost Of Credit To All Consumers.

The Court should grant review for the additional reason that the decisions below aggravate a conflict among the federal courts of appeals on the meaning of the term

"willful" in FCRA. The Act subjects insurance companies to liability for actual damages, statutory penalties, *punitive damages*, and attorney's fees for "willful" violations of statutory requirements. See 15 U.S.C. § 1681n(a). As this Court has explained, "willful" is a term of "many meanings," and its proper interpretation is "often dependent on the context in which it appears." *Bryan* v. *United States*, 524 U.S. 184, 191 (1998); *Ratzlaf* v. *United States*, 510 U.S. 135, 141 (1994); *Spies* v. *United States*, 317 U.S. 492, 497 (1943).

In FCRA, Congress made a considered decision to reserve the drastic remedies of penalties and punitive damages for only the most egregious violations. The original Senate bill required the plaintiff to show that the defendant was "grossly negligent" to obtain *actual* damages, and that the violation was "willful" to obtain *punitive* damages. See S. 3678, 91st Cong. §§ 616, 617 (1970). Because gross negligence is equivalent to recklessness, see *Restatement (Second) of Torts* § 282 cmt. e (1965), the effect of the Senate bill was to distinguish misconduct that was merely reckless from misconduct that was more egregious, *i.e.*, "willful." Likewise, the House distinguished recklessness from willfulness, rejecting alternative versions of FCRA that would have authorized punitive damages for violations that were "grossly negligent or willful." See H.R. 19403, 91st Cong. § 52 (1970); H.R. 19410, 91st Cong. § 52 (1970). Thus, it was the unmistakable intention of Congress to set apart conduct that was more egregious than gross negligence (or recklessness) for punitive damages liability.

This policy is also manifest in FCRA's structure. For example, Section 1681n authorizes damages for "willful" violations in two different circumstances. For "willful" violations of most FCRA requirements, the statute provides that the consumer may receive actual damages of "not less than $100 and not more than $1,000." 15 U.S.C. § 1681n(a)(1)(A). For "willful" violations of the prohibition against "obtaining a consumer report under false

pretenses or knowingly without a permissible purpose," the statute provides that the consumer may receive the greater of her actual damages or $1,000. *Id.* § 1681n(a)(1)(B). Because (1) "willful" must have the same meaning in both circumstances, see *Ratzlaf*, 510 U.S. at 143, and (2) the statute speaks of "willful" violation of a prohibition against obtaining a consumer report "*knowingly* without a permissible purpose," the term "willful" must entail *at least* actual knowledge in this context as well.[2]

Consistent with the legislative history and statutory structure, most federal circuits that have addressed the issue have concluded that a defendant may be liable for "willful" violation of FCRA only where it knowingly and consciously violated statutory mandates. *E.g.*, *Wantz* v. *Experian Info. Solutions*, 386 F.3d 829 (7th Cir. 2004); *Phillips* v. *Grendahl*, 312 F.3d 357 (8th Cir. 2002); *Dalton* v. *Capital Associated Indus., Inc.*, 257 F.3d 409 (4th Cir. 2001); *Duncan* v. *Handmaker*, 149 F.3d 424 (6th Cir. 1998); *Stevenson* v. *TRW, Inc.*, 987 F.2d 288 (5th Cir. 1993).[3] As the Eighth Circuit explained in *Phillips*, "the defendant must commit the act that violates the Fair Credit Reporting Act with knowledge that he is committing the act * * * *and* he must also be conscious that his act impinges on the rights of others." 312 F.3d at

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[2] FCRA also provides a criminal penalty for "any person who *knowingly and willfully* obtains information on a consumer from a consumer reporting agency under false pretenses." 15 U.S.C. § 1681q (emphasis added).

[3] Although the Third Circuit previously adopted a "reckless disregard" standard, even that court recognized that a defendant's conduct must be "on the same order as willful concealments or misrepresentations" to warrant punitive damages. *Cushman* v. *Trans Union Corp.*, 115 F.3d 220, 227 (3d Cir. 1997).

368 (emphasis added). Thus, in most federal circuits, a company cannot be liable for punitive damages where it mistakenly, but not deliberately, violates FCRA's notice requirement.

Not only does the Ninth Circuit's expansive interpretation of "willful" conflict with the interpretation uniformly applied by these other circuits, but it also creates significant practical problems for covered businesses and their counsel. Under the Ninth Circuit's rule, a business subject to FCRA may be charged with a "willful" violation—and thus be subject to punitive damages—*even if it did not know that it was violating the statute at all*, and even if it was merely following the advice of counsel on an unsettled legal issue under the statute.

Perhaps even more troubling is the Ninth Circuit's suggestion that a user of credit reports is subject to punitive damages for violating FCRA if its counsel's advice is "untenable" or "implausible" in the eyes of the court of appeals, *regardless of the fact that the district court agreed with its counsel's interpretation of the statute*. Indeed, the district court in these cases granted the insurance companies judgment as a matter of law on the ground that their interpretation of FCRA was correct.

Moreover, the burden appears to rest on the *defendant* to refute the claim for punitive damages: According to the Ninth Circuit, a business may be liable for punitive damages unless it "diligently and in good faith" sought to determine its statutory obligations and "thereby" took a "reasonable" or "tenable" position under the statute. *Reynolds*, 435 F.3d at 1099. Under this rule, the named plaintiff need do no more than assert that the defendant "willfully" (or without a good-faith basis) violated FCRA to survive a motion to dismiss.

This result increases the likelihood that covered businesses will bear the costs of punitive damages awards, either by paying large judgments or by entering into

"blackmail settlements" reflecting the potential for a high punitive award. As Judge Easterbrook has explained, settlement in such large-scale litigation "becomes almost inevitable—and at a price that reflects the risk of a catastrophic judgment as much as, if not more than, the actual merit of the claims." See *In re Bridgestone/ Firestone, Inc.*, 288 F.3d 1012, 1015-1016 (7th Cir. 2002); see also Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973) ("[w]hile the benefits to the individual class members are usually minuscule, the possible consequences of a judgment to the defendant are so horrendous that these actions are almost always settled").

In addition, this result will compel businesses to incur additional costs, either in conducting their operations in the most conservative manner, or in obtaining "second opinions" to test their own counsel's advice. This Court has recognized that, "[i]n light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, constantly go to lawyers to find out how to obey the law." *Upjohn Co.* v. *United States*, 449 U.S. 383, 392 (1981) (quotations omitted). And that is especially true in areas where compliance is "hardly an instinctive matter." *Ibid.* There is a cost associated with asking lawyers to approve business practices, and a risk associated with not asking. The pernicious effect of the decisions below is to *increase the cost* of the most responsible corporate behavior—consulting legal counsel before engaging in business practices regulated by federal statute. See *ibid.* (acknowledging the "valuable efforts of corporate counsel to ensure their client's compliance with the law").

These costs undoubtedly will be passed on to consumers, who will receive no additional benefit beyond that which ordinary remedies would provide. Here again, then, the decisions below amount to over-regulation by a court, inconsistent with the careful balance of interests that Congress struck when it enacted FCRA. The Ninth

Circuit's decisions undermine Congress' choice to reserve punitive damages for deliberate, conscious misconduct and conflict with the decisions of most other federal circuits, to the certain detriment of consumers nationwide. This Court should grant review to resolve the settled conflict among the courts of appeals and to establish a single standard for punitive damages liability under FCRA.

III. The Decisions Below Are Of Enormous Practical Importance Not Only To The Financial Services Industry, But To Consumers Of Their Services.

The practical impact of the decisions below also weighs heavily in favor of review. FCRA touches millions of consumer credit transactions each day, and it affects the routine business operations of banks, credit unions, insurance companies, mortgage lenders, and retailers nationwide. Given the scope of the statute's operation and the importance of consumer credit to our economy, the effects of the decisions below will reach far beyond the particular transactions at issue in these four cases. Indeed, as FreedomWorks' chief economist has explained: "[FCRA] has allowed the United States to develop one of the most efficient and sophisticated financial services markets in the world. Seventy-five percent of all households are participants in the market for consumer credit or mortgages." *Fair Credit Reporting Act: How It Functions for Consumers and the Economy*, *supra*, at 66 (statement of Wayne T. Brough).

Because FCRA regulates enormous numbers of credit-related transactions, the decisions below likely will spawn massive amounts of new litigation, the costs of which ultimately will be borne by consumers. "Each of the three national credit reporting companies has records on perhaps as many as 1.5 billion credit accounts held by approximately 190 million individuals. Credit reporting companies generally receive information from creditors and others every month, and they normally update their

credit records within one to seven days of receiving new information. According to industry sources, each of the three national credit reporting companies receives more than 2 billion items of information each month." Avery, *et al.*, *supra*, at 49. That is ample fodder for FCRA litigation, and because FCRA does not cap the amount of damages recoverable in a class action, the Court can be certain that new litigation will be large-scale and very expensive. See D. Permut & T. Moore, *supra*, at 931.

Moreover, simply because of the sheer size of the Ninth Circuit's territory in relation to the national economy, the decisions below likely will force financial services companies to modify or curtail their activities on a nationwide basis, resulting in further harm to consumers. In 2004, the nine States comprising the Ninth Circuit had gross state products totaling more than $2.3 trillion—nearly 20 percent of the Nation's gross domestic product for that year.[4] California's gross product alone was nearly $1.5 trillion,[5] making California's the sixth-largest economy in the world.[6] Insurance-related activities contributed more than $42.5 billion to the economies of the States comprising the Ninth Circuit,[7] and in 2005 more

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[4] See United States Department of Commerce, Bureau of Economic Analysis, *Gross State Product*, available at http://www.bea.gov/bea/regional/gsp.htm (visited Aug. 21, 2006).

[5] See *id.*

[6] See California Legislative Analyst's Office, *CalFacts 2004: California's Economy and Budget in Perspective*, available at http://www.lao.ca.gov/2004/cal_facts_2004_calfacts_econ.htm (visited Aug. 21, 2006).

[7] See Bureau of Economic Analysis, *supra*.

than $91.4 billion in direct premiums for property and casualty insurance were written in these States.[8]

To compensate for the added costs of providing gratuitous adverse-action notices and obtaining multiple legal opinions before engaging in practices regulated by FCRA—as required by the Ninth Circuit's decisions—banks, insurance companies, and other covered businesses may change the terms of the credit they extend or the prices or availability of products they sell to consumers nationwide. As a result, if the decisions below are allowed to stand, fewer consumers will have access to credit on terms advantageous to them.

* * * * *

The decisions below rest on fundamental misreadings of FCRA that significantly increase the costs of compliance with the statute. Users of credit reports and other covered businesses will pay those costs, but only in the first instance. They will pass those costs on to consumers, for whose benefit FCRA was enacted, in the form of higher prices and a narrower range of coverage. The decisions below thus amount to judicial over-regulation of the consumer credit market, and they should not be permitted to jeopardize FCRA's continued success in promoting the free flow of credit information while protecting consumer privacy.

CONCLUSION

The petitions for a writ of certiorari should be granted.

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[8] See Insurance Information Institute, *Direct Premiums Written, Property/Casualty Insurance By State, 2005*, available at http://www.economicinsurancefacts.org/economics/state/premiums.htm (visited Aug. 21, 2006).

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